

BEFORE THE
SURFACE TRANSPORTATION BOARD

231974

STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

**UNION PACIFIC RAILROAD COMPANY'S REPLY TO THE JOINT APPEAL
OF WESTERN COAL TRAFFIC LEAGUE'S "MEMBER ORGANIZATIONS"**

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UP urges the Board to deny the joint appeal of WCTL's Member Organizations, filed March 1, 2012, which seeks to reverse a decision by the Director of the Board's Office of Proceedings that WCTL's Member Organizations "are subject to discovery in this proceeding under the Board's subpoena power." Decision served Feb. 27, 2012, at 1. UP is not seeking discovery in this proceeding, but it is concerned that the position taken by WCTL's Member Organizations would allow shippers to shield themselves from legitimate discovery in Board proceedings by channeling challenges to railroad rules and practices through shipper organizations.

It would be contrary to the interests of justice if shipper organizations could file complaints or seek declaratory orders challenging railroad rules or practices that apply to their members, but railroads could not obtain the same discovery that would have been available if the members had filed the complaints or sought the orders in their own names. Especially when a rule is challenged because of its alleged impact on shipper members' costs or operations, the railroad's inability to obtain discovery from affected shippers may leave it unable to respond fully to the challenge and may leave the Board without a complete record on which to base its decision.

This is plainly a case in which WCTL's members should be subject to discovery.¹ WCTL is arguing that the "safe harbor" provision of BNSF Railway Company's coal dust tariff is unreasonable because of its impact on its members' costs and liabilities. *See* Decision served Nov. 22, 2011, at 4 n.5. If WCTL members have information regarding those issues that would be discoverable in a case filed by an individual member, they should not be allowed to shield the information from discovery simply because they channeled their challenge through WCTL.

The Member Organizations' appeal raises an issue that will affect many future proceedings. UP faced the same issue in an ongoing case filed by North American Freight Car Association ("NAFCA"). UP served discovery requests on NAFCA that sought information and documents from individual NAFCA members. UP was prepared to subpoena the members, but after negotiations, NAFCA agreed to respond on their behalf. Obviously, if NAFCA knew that UP could not subpoena its members, it would have had no incentive to cooperate with UP. In other words, if the Board rules in favor of the Member Organizations, the consequences are predictable: shipper organizations, rather than shippers, will file most future challenges to the reasonableness of railroad practices, and neither railroads nor the Board will have access to information from shippers, except the information shippers may choose to submit.

In this case and in UP's litigation with NAFCA, the railroads asked the shipper organization to coordinate discovery on behalf of its members to avoid the need for subpoenas. If the shipper organization that challenges a railroad practice agrees to coordinate a discovery response on behalf of its members or already has the responsive information in its files, the issuance of subpoenas to individual members may be unjustified. Indeed, UP suspects that railroads would prefer to work through shipper organizations in most cases, since their own


¹ UP takes no position on whether BNSF's specific discovery requests are appropriate, but UP observes that they cover many of the same topics as the requests WCTL served on BNSF.

discovery costs would be lower. But in a case like this, where the shipper organization has refused to take on the coordination role and does not have responsive information in its own files, a railroad must be allowed to seek discovery from the organization's members. This is plainly an appropriate use of the Board's subpoena power.²

Accordingly, the Board should affirm the Decision served February 27.

Respectfully submitted,

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March 6, 2012

² As the Director's decision recognizes, the Board can protect the recipient of a subpoena from unreasonable discovery by using its usual tools for establishing the boundaries of discovery, so the possibility that the discovery requests might need to be narrowed is no reason to deny all legitimate discovery against the recipient of a subpoena. *See* Decision served Feb. 27, 2012, at 3-4.

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 6th day of March, 2012, I caused a copy of Union Pacific Railroad Company's Reply to the Joint Appeal of Western Coal Traffic League's "Member Organizations" to be served by e-mail on all parties of record in this proceeding.



Michael L. Rosenthal